Ab Lah bin Ali v Yong Wah Sing

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–7 OF 1998
LOW HOP BING J
6 AUGUST 2003

Civil Procedure *— Costs — Interest — Interest on taxed costs — Contest between 'incipitur rule' and 'allocatur rule' — Whether interest to run from date of judgment or from date of completion of taxation*

Civil Procedure *— Costs — Interest — Rate of interest — Whether rate of 8%pa proper — Whether court ought to review rate of interest awarded on appeal — Whether taxing registrar properly exercised discretion on rate of interest to be awarded*

The appellant's appeal had been dismissed with costs. Notice of taxation was duly filed and disposed of. No interest having been sought by the respondent, interest on the taxed costs was not awarded by the then taxing registrar. However, following the decision in *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [2002] 3 MLJ 705 and the allocatur in this action not having then been extracted, the respondent requested for the issue to be tried. The registrar then awarded interest on the taxed costs at the rate of 8%pa from the date of judgment to the date of realization. The appellant appealed. The appellant paid the taxed costs and interest only from the date of allocatur to the date of realization, leaving the remaining interest, from the date of the judgment to the date of the allocatur, unpaid. The appellant, mindful of the 'the incipitur rule', urged the court to reconsider the law and to apply 'the allocatur rule' which says that interest on taxed costs should run from the date the taxation of costs is completed by the issue of the taxing registrar's allocatur. The respondent contended that the 'incipitur rule' applied in Malaysia.

Held, dismissing the appeal:

(1) The contest between the incipitur rule and the allocatur rule in the UK was finally resolved in *Hunt v RM Douglas (Roofing) Ltd* [1988] 3 WLR 975, which affirmed the incipitur rule and overruled *K v K (divorce costs: interest)* [1977] 1 All ER 576. Accordingly, the incipitur rule prevailed in the UK and the allocatur rule ceased to apply (see p 562B–C).

(2) In Malaysia, the incipitur rule was applied in *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276. On a true construction of O 40 r 11(2) of the then Supreme Court Rules 1957, in respect of taxed costs, interest was to be awarded from the date of entry of judgment (see p 562C–D).

(3) The present rule governing the award of interest on judgment debts is contained in O 42 r 12 of the Rules of the High Court 1980 ('RHC') and interest is to be awarded, following the incipitur rule, from the date of judgment (see p 562D–F); *Gooi Hock Seng v Chuah Guat Khim, Pemegang harta pesaka bagi estet*

Chuah Teow Hock, simati [2000] 3 AMR 3683 and *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276 followed. A

(4) Order 42 r 12 of the RHC specifically states that the rate of interest shall be at 8%pa or such other rate of interest as the court directs. The learned registrar had, in the exercise of her discretion, awarded 8% interest and the court was unable to find any error in the exercise of that discretion (see p 563D–E). B

[Bahasa Malaysia summary

Rayuan perayu telah ditolak dengan kos. Notis penaksiran kos telah difailkan dan diselesaikan Memandangkan faedah ke atas kos tidak dituntut, maka tiada faedah ke atas kos yang ditaksirkan diperintahkan oleh pendaftar penaksir. Walau bagaimanapun selepas keputusan dalam *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [2002] 3 MLJ 705 dan memandangkan yang alokatur bagi tindakan ini belum lagi dikeluarkan, responden meminta agar isu itu dibicarakan. Pendaftar kemudiannya mengawardkan faedah ke atas kos yang ditaksir pada kadar 8%pa dari tarikh penghakiman sehingga tarikh penyelesaian. Perayu telah merayu. Perayu membayar kos yang ditaksir bersama-sama dengan faedah daripada tarikh alokatur sehingga tarikh penyelesaian, dengan baki faedah, daripada tarikh penghakiman sehingga tarikh alokatur, tidak dibayar. Perayu, sedar akan 'prinsip incipitur', mendesak agar mahkamah menimbangkan semula undang-undang supaya menggunakan 'prinsip alokatur' yang menyatakan bahawa faedah ke atas kos yang ditaksir harus dikenakan daripada tarikh penaksiran kos tersebut diselesaikan dengan pengeluaran alokatur pendaftar penaksir. Responden berhujah bahawa 'prinsip incipitur' terpakai di Malaysia. C D E F

Diputuskan, menolak rayuan itu:

(1) Peraduan antara prinsip incipitur dan prinsip alokatur di UK telah diputuskan dalam *Hunt v RM Douglas (Roofing) Ltd* [1988] 3 WLR 975, yang mengesahkan prinsip incipitur dan mengenepikan *K v K (divorce costs: interest)* [1977] 1 All ER 576. Seterusnya, prinsip incipitur digunakan di UK dan prinsip alokatur tidak lagi terpakai (lihat ms 562B–C). G

(2) Di Malaysia, prinsip incipitur digunakan dalam *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276. Dalam penafsiran sebenar A 40 k 11(2) Kaedah-Kaedah Mahkamah Agung 1957 pada masa itu, berkenaan dengan kos yang ditaksir, faedah diawardkan daripada tarikh kemasukkan penghakiman (lihat ms 562C–D). H

(3) Peruntukan semasa mengenai award faedah ke atas tanggungan penghakiman dikandung dalam A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan faedah harus diawardkan, mengikut prinsip incipitur, daripada tarikh penghakiman (lihat ms 562D–F); *Gooi Hock Seng v Chuah Guat Khim, Pemegang harta* I

pesaka bagi estet Chuah Teow Hock, simati [2000] 3 AMR 3683 dan *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276 diikut.

(4) Aturan 42 k 12 KMT secara khusus memperuntukkan bahawa faedah hendaklah diawardkan pada kadar 8%pa atau pada kadar lain yang diarah mahkamah. Pendaftar yang arif telah, dalam menggunakan budi bicaranya, mengawardkan faedah pada kadar 8% dan mahkamah ini tidak mendapati sebarang kekhilafan dalam pelaksanaan budi bicara tersebut (lihat ms 563D–E).

Notes

For cases on interest on costs, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1663–1664.

Cases referred to

Ashworth v English Card Clothing Company, Limited (No 2) [1904] 1 Ch 704 (refd)
Boswell v Coaks (1887) 57 LJ Ch 101 (refd)
Chen Teti v Ornaresort Berhad [2003] MLJU 50 (refd)
Comptroller of Income Tax v PL RM Family & PV Family [1953] MLJ 156 (refd)
Erven Warnink BV v J Townsend & Sons (Hull) Ltd (No 2) [1982] 3 All ER 312 (refd)
Fisher v Dudding [1841] 9 Dowl 872 (refd)
Gooi Hock Seng v Chuah Guat Khim, Pemegang harta pesaka bagi estet Chuah Teow Hock, simati [2000] 3 AMR 3683 (folld)
Hitachi Zosen Robin Dockyard (Pte) Ltd v Lee Pui Keng & Anor [1988] 2 MLJ 473 (refd)
Hunt v RM Douglas (Roofing) Ltd [1988] 3 WLR 975 (refd)
Jefford and Another v Gee [1970] 2 WLR 702 (refd)
K v K (divorce costs: interest) [1977] 1 All ER 576 (refd)
Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors [2002] 3 MLJ 705 (refd)
Landowners' West of England and South Wales Land Drainage and Inclosure Co v Ashford (1884) 33 WR 41 (refd)
Liau Kim Lian v Bajuria [1971] 1 MLJ 276 (folld)
Lloyds Bank plc v Ang Cheng Ho Quarry & Ors [1993] 1 MLJ 127 (refd)
London Wharfing and Warehousing Co, Re [1885] 54 LJ Ch 1137 (refd)
Newton v Grand Junction Rly Co (1846) 16 M & W 139 (refd)
P Suppiah, (Tara Rajaratnam, judgment creditor), Re [1989] 2 MLJ 479, [1989] 2 CLJ 461 (refd)
Pyman & Co v Burt, Boulton (1884) WN 100 (refd)
Raja Abdullah Wahman bin Raja Sulaiman v Toplink Technologies Sdn Bhd [2003] MLJU 4 (refd)
Sam Hock Ming v Hong Leong Assurance Sdn Bhd [1635] MD 2 (refd)
Taylor v Roe [1894] 1 Ch 413 (refd)

Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30 (refd) A
Vong Ban Hin v Laksamana Realty Sdn Bhd [2003] 2 MLJ 356 (refd)

Legislation referred to

Civil Law Act 1956 ss 3, 11 B
Courts of Judicature Act 1964 ss 16, 25(2), para 7 of the sch
Judgments Act 1838 [UK] s 17
Rules of the High Court 1980 O 42 r 12
Rules of the Supreme Court 1957 40 r 11(2)
Rules of the Supreme Court 1883 [UK] C
Rules of the Supreme Court (Revision) 1965 [UK]
Supreme Court of Judicature Acts 1873 and 1875 [UK] Sch 1, Appendix F, Form 1

Lai Kuan Jean (Tay & Company) for the appellant.
Jaspal Singh Gill (Raghbir Singh Norizan & Co) for the respondent. D

Low Hop Bing J:

Appeal

It seems to me that two factors viz the instinct for an adversarial battle and the passion for in-depth research on the part of the appellant's learned E counsel have sparked off this appeal against the decision of the learned registrar who on 29 May 2003 awarded interest at 8%pa on the taxed costs, with effect from the date of the High Court judgment on 10 January 2001, and not from the date of allocatur issued by taxing registrar on 2 October 2002. F

Factual background

On 10 January 2001, KN Segara J dismissed with costs ('the High Court judgment') the appellant's appeal against a sessions court decision.

Notice of taxation in encl (19) was filed on 22 October 2001 and when G it was disposed of on 2 October 2002, no interest was awarded by the then taxing registrar on the taxed costs since it was not sought by the respondent's learned counsel.

However, after *Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors* [2002] 3 MLJ 705 was reported, the respondent's learned counsel on H 30 October 2002 wrote to the learned registrar requesting the issue to be tried, on the ground that the allocatur has not been extracted and so the learned registrar was not functus officio.

Upon hearing both learned counsel, on 29 May 2003, the learned registrar awarded interest at the rate of 8%pa on the taxed costs of RM36,862.10 from 10 January 2001 to the date of realization. I

The appellant has paid the taxed costs together with interest thereon from the date of allocatur till the date of full payment of the taxed costs,

leaving the interest unpaid, from the date of the High Court judgment on 10 January 2001 till 2 October 2002, pending my decision in this appeal.

Submission for appellant

Miss Lai Kuan Jean, the appellant's learned counsel, is mindful of the 'the incipitur rule' which says that interest on taxed costs is to run from the date of entry of judgment.

However, she urges this court to reconsider the law and to apply 'the allocatur rule' which says that interest on taxed costs should run from the date the taxation of costs is completed by the issue of the taxing registrar's allocatur.

She elaborated that there are two sets of interest viz:

(1) under s 11 of the Civil Law Act 1956 for the period 'between the date when the cause of action arose and the date of judgment'; and

(2) under O 42 r 12 of the Rules of the High Court 1980 ('RHC') for post-judgment interest.

In the instant appeal, she submitted that O 42 r 12 of the RHC applies, and that the Federal Court decision in *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276 which is on the construction of O 40 r 11(2) of the then Rules of Supreme Court 1957 may be distinguished from O 42 r 12 of the RHC on the ground that the provisions in these two orders are not in pari materia.

As regards *Gooi Hock Seng v Chuah Guat Khim, Pemegang harta pesaka bagi estet Chuah Teow Hock, simati* [2000] 3 AMR 3683, it was submitted that the issue was 'whether interest is payable where an order directs payment of costs to be taxed' and that *Sam Hock Ming v Hong Leong Assurance Sdn Bhd* [1635] MD 2 should not have been followed.

She then contended that in *Hunt v RM Douglas (Roofing) Ltd* [1988] 3 WLR 975, the House of Lords applied 'the incipitur rule' on the basis of s 17 of the Judgments Act 1838 (UK) which provided, inter alia, that 'every judgment debt shall carry interest ... from the time of entering the judgment' and that '... any costs ... shall have the effect of judgments ...'. She said that Malaysia does not have such a provision, other than the Courts of Judicature Act 1964, ss 16, 25(2) and para 7 in the schedule thereto, regulating the powers of the court to award interest on eg judgment debts, and to order when interest on costs is to run.

It was also submitted that in Malaysia an order for payment of costs to be taxed cannot be a judgment debt because no execution can be levied until it is quantified and *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 and *Comptroller of Income Tax v PL RM Family & PV Family* [1953] MLJ 156 were cited in support.

In the light of s 3 of the Civil Law Act 1956, she submitted that the statutes referred to in the English cases cited in *Liau Kim Lian*, *Gooi Hock Seng* and *Kerajaan Negeri Johor v Adong* are not for general application in our courts.

The appellant's learned counsel relied on the rules of equity in contending that this court should follow *K v K (divorce costs: interest)* [1977] 1 All ER 576, which, she submitted, has been followed by LC Vohrah J in *Re P Suppiah, (Tara Rajaratnam, judgment creditor)* [1989] 2 MLJ 479, [1989] 2 CLJ 461.

She said interest is to be awarded on the basis of a person being kept out of money which ought to have been paid, as was said in *Jefford and Another v Gee* [1970] 2 WLR 702; and *Hitachi Zosen Robin Dockyard (Pte) Ltd v Lee Pui Keng & Anor* [1988] 2 MLJ 473 Singapore Court of Appeal.

Interest, she added, was not even awarded in *Lloyds Bank plc v Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127, as it was discretionary, not mandatory.

Finally, in the event that this court is not persuaded to apply 'the allocatur rule', she asked the court to reduce the interest to 4%pa as 8% is a punishment to the appellant for having to pay more than that paid by financial institutions.

Contention for respondent

Mr Jaspal Singh Gill, learned counsel for the respondent, contended that in Malaysia, 'the incipitur rule' applies and that *Liau Kim Lian* should not be distinguished.

He submitted that in *P Suppiah* the judgment creditor had merely asked for interest from the date of taxation and not from the date of judgment.

He added that *K v K (divorce costs: interest)* had been overruled by the House of Lords in *Hunt* and that UK and Malaysia share the same position ie 'the incipitur rule' applies.

Decision on appeal

Questions for determination

Both the learned counsel have settled the following questions for determination herein:

(1) where a successful party is awarded costs, does the interest thereon run from the entry of the judgment or from the date of completion of taxation by way of an allocatur by the taxing registrar?;

(2) if the interest runs from the entry of the judgment, should the interest be at 8%pa or less?

Incipitur rule or allocatur rule?

In deference to the getting up which both the learned counsel have diligently exerted, I shall delve upon the development of these two rules, which have been so succinctly set out by Lord Ackner of the House of Lords in *Hunt* at pp 978–981, which I shall venture to summarize herein.

A In the UK, prior to the passing of the Judgments Act 1838, interest on costs could not be recovered.

Later, under s 17 of the Judgments Act 1838, 'every judgment debt shall carry interest ... from the time of entering up the judgment ... until the same shall be satisfied'.

B The Judgments Act 1838 did not define the vital words 'entering up the judgment'. This had led to different views taken by the common law courts, as opposed to the Chancery courts.

In *Fisher v Dudding* [1841] 9 Dowl 872, the Court of Common Pleas applied the incipitur rule and awarded interest on costs from the date of the incipitur ie the time of signing judgment or making the entry of the incipitur C in the master's book. That decision was approved in *Newton v Grand Junction Rly Co* (1846) 16 M & W 139 of the Court of Exchequer.

However the Court of Chancery apparently took a different view by applying the allocatur rule in *Boswell v Coaks* (1887) 57 LJ Ch 101 in awarding interest on costs from the date of the allocatur (certificate) of the D taxing master (the counterpart of our registrar).

The Supreme Court of Judicature Acts 1873 and 1875 (UK) set up the High Court of Justice. In Schedule 1 to the Act of 1875 there appeared in Appendix F, Form 1 which directed the sheriff to levy the amount of costs allowed on taxation 'together with interest thereon', with a reference to a E footnote which stated: 'the date of the certificate of taxation' in line with the allocatur rule.

Subsequently, the Chancery practice of applying the allocatur rule was effected throughout the entire High Court.

1883 saw new Rules of the Supreme Court (UK) and the allocatur rule F effected by the aforesaid footnote was replaced by a new footnote:

> Day of the judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.

The effect of the alteration of the statutory footnote was considered in *Pyman & Co v Burt, Boulton* (1884) WN 100, where Field J concluded:

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> In the absence of any special order, no distinction is made between interest on the debt and interest on the costs. Both begin to run from the day of the judgment.

The incipitur rule was applied and followed by Pearson J in the Chancery Division in *Landowners' West of England and South Wales Land Drainage and* H *Inclosure Co v Ashford* (1884) 33 WR 41; *Re London Wharfing and Warehousing Co* [1885] 54 LJ Ch 1137; *Boswell v Coaks*; *Taylor v Roe* [1894] 1 Ch 413; and *Ashworth v English Card Clothing Company, Limited (No 2)* [1904] 1 Ch 704.

From 1884 to 1965, the principle that interest on costs ran from the I date of judgment appeared to have been firmly established.

However, 1965 saw the Rules of the Supreme Court (Revision) (UK) and the footnote in Form 1 was omitted altogether, as a result of which Lord

Denning MR in *K v K* at p 582 held that the modern rule should be and is, that interest on costs ran from the date of the master's certificate of taxation quantifying the same or such other date as may be ordered as the date on which payment is to be made.

Be that as it may, in *Erven Warnink BV v J Townsend & Sons (Hull) Ltd (No 2)* [1982] 3 All ER 312, another UK Court of Appeal favoured the incipitur rule.

The contest between the incipitur rule and the allocatur rule was finally resolved by the House of Lords in *Hunt* which concluded that the Court of Appeal in *K v K* misapprehended the nature of the amendment made to the new form and the decisions in *Pyman* and *Boswell* affirming the incipitur rule, were correct. Accordingly, the incipitur rule prevails. In the circumstances *K v K* has been overruled by the House of Lords and so the allocatur rule ceased to apply.

In Malaysia, the incipitur rule was applied by the Federal Court in *Liau Kim Lian*. On a true construction of O 40 r 11(2) of the then Rules of the Supreme Court 1957 (the precursor of the RHC), in respect of taxed costs, interest was awarded from the date of entry of judgment. This was followed by Peh Swee Chin J (later FCJ) in *Sam Hock Ming*.

The present rule governing the award of interest on judgment debts is contained in O 42 r 12 of the RHC in the following words:

> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

Order 42 r 12 was given judicial gloss by Abdul Malek Ahmad FCJ in *Gooi Hock Seng*. In relation to the item of interest on costs, the applicants' counsel there had not impressed upon the taxing registrar that the order for costs was a judgment debt under O 42 r 12 and no interest thereon was awarded. Upon review, the learned judge of the Federal Court followed the incipitur rule enunciated in *Liau Kim Lian* and *Hunt* and awarded interest from the date of judgment.

The same learned judge also awarded 8% interest on costs from the date of the judgment of the appeal although not specifically claimed in *Kerajaan Negeri Johor v Adong*.

The incipitur rule was also applied by Abdul Malik Ishak J in *Raja Abdullah Wahman bin Raja Sulaiman v Toplink Technologies Sdn Bhd* [2003] MLJU 4, and by me in *Chen Teti v Ornaresort Berhad* [2003] MLJU 50; and *Vong Ban Hin v Laksamana Realty Sdn Bhd* [2003] 2 MLJ 356.

I have my reservation on the accuracy of the submission by learned counsel for the appellant to the effect that *K v K* was followed by LC Vohrah J in *P Suppiah*. Upon a proper perusal of the learned judge's judgment, it is to be observed that *K v K* was referred to by his Lordship who concluded as follows at p 483:

A In the present case the judgment creditor has not asked for interest from the date of judgment as she would seem entitled to on the authority of *Liau Kim Lian*'s case [[1971] 1 MLJ 276] but only from the date of taxation, a date which I prefer as being more reasonable.

It is interesting to note that Abdul Malik Ishak J in *Raja Abdullah* observed that LC Vohrah J had vigorously applied the rule that interest is to be B calculated from the date of judgment.

On my part, in addition to the observation of Abdul Malik Ishak J, I would add that the judgment of LC Vohrah J is to the effect that had the appellant there asked for an award of interest from the date of the judgment, it would have been granted, but in the absence of such a prayer, the award C of interest from the date of taxation was preferred as being more reasonable. Hence, I am unable to see how the appellant herein is able to derive any support from the judgment of LC Vohrah J in *P Suppiah*.

The answer to question 1 above is that the incipitur rule applies and award of interest on costs shall be from the date of the entry of judgment to D the date of realization.

The rate of interest

Order 42 r 12 specifically states that the rate of interest shall be at 8%pa or such other rate of interest as the court directs. The learned registrar has awarded 8% interest and I am unable to find any error in the exercise of that E discretion as she has indeed followed the first limb of O 42 r 12 and correctly applied established judicial principles alluded to in the aforesaid plethora of authorities.

Conclusion

F On the foregoing grounds, I am unable to sustain the submissions presented for the appellant. I therefore dismiss this appeal and affirm the decision of the learned registrar. As the parties' counsel have agreed that no costs be ordered in this appeal, I hereby give effect to their wishes and make no order as to costs herein.

G *Appeal dismissed.*

Reported by Sivapragasam Kumaren

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